

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARC J. GABELLI AND BRUCE ALPERT, :

4 Petitioners : No. 11-1274

5 v. :

6 SECURITIES AND EXCHANGE :

7 COMMISSION :

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9 Washington, D.C.

10 Tuesday, January 8, 2013

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:13 a.m.

15 APPEARANCES:

16 LEWIS LIMAN, ESQ., New York, New York; on behalf of
17 Petitioners.

18 JEFFREY B. WALL, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.;
20 on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-1274, Gabelli and
5 Alpert v. the Securities and Exchange Commission.

6 Mr. Liman.

7 ORAL ARGUMENT OF LEWIS LIMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. LIMAN: Mr. Chief Justice, and may it
10 please the Court:

11 This case concerns the statute dealing
12 exclusively with penalty claims brought by government
13 agencies to punish conduct made unlawful by statute.
14 Congress provided a clear and easily administered
15 statutory time limitation on the Government's power to
16 punish: 5 years, except as otherwise provided by
17 Congress.

18 The case does not concern -- the statute
19 does not concern the Government's power to seek remedial
20 remedies such as disgorgement and injunction.
21 Consistent with Congress's normal approach in penal
22 situations, Congress fixed a statute of limitations for
23 penalties. The court below, for the first time over the
24 century the statute has been in existence, sweepingly
25 concluded that unless Congress clearly directed

1 otherwise, the statute and the 5 years did not begin to
2 run from the time the defendant violated the law, the
3 ordinary rule for statutes providing for accrual, but
4 instead --

5 JUSTICE GINSBURG: Mr. Liman. Mr. Liman,
6 you -- you are typing this a penalty case. The
7 government says the accrual is the ordinary rule, but
8 discovery is the rule in this Court, and so it is
9 alleged here. So how does the Court decide whether to
10 type this case a penalty case, as you allege, or a fraud
11 case, as the government urged -- urges, when both
12 captions fit?

13 MR. LIMAN: Your Honor, I think there are
14 two answers to that. First is that the Court doesn't
15 need to decide, Congress has decided. Congress made it
16 quite clear that the rule of accrual applied to all
17 penalty claims. And as this Court held in
18 Clark v. Martinez, the same word in a statute cannot be
19 given different interpretations depending on the
20 underlying statute to which it is applied.

21 The second reason, though, Justice Ginsburg,
22 is that it is not correct to say -- and this Court has
23 never said -- that either the Bailey rule or the injury
24 accrual rule applies to a statutory fraud claim where
25 the government is seeking to punish. That would --

1 JUSTICE KENNEDY: Excuse me.

2 Justice Ginsburg points out that you're talking about
3 the statute, but the statute uses the term "accrual."
4 Is it correct to say the term "accrual" is not used in
5 statute of limitations for crimes -- generally -- for
6 crimes?

7 MR. LIMAN: For -- for crimes, the general
8 word that is used is time period from the violation.

9 JUSTICE KENNEDY: Right. And this -- and
10 this talks about accrual. So that is indicative -- is
11 indicative of the fact that Congress is using a civil
12 analogue in the drafting of this statute.

13 MR. LIMAN: Your Honor, it indicates that
14 Congress is using accrual as it is understood at common
15 law. Common law, it means when the claim becomes ripe
16 and the plaintiff has the ability to sue. What that
17 means is, as the D.C. Circuit said in 3M -- and we think
18 the D.C. Circuit got it right on this -- that you look
19 to the underlying statute pursuant to which the
20 government is seeking a penalty to see when the claim
21 became ripe.

22 In a penalty situation, and under the IAA,
23 which is what this concerns -- it doesn't concern a
24 common law fraud claim; it doesn't concern a claim where
25 there's even any element of deception that's required.

1 It's a breach of fiduciary duty. What the IAA says is
2 that the government can sue when the violation occurs.

3 Now --

4 JUSTICE SOTOMAYOR: Mr. Liman, I understand
5 your argument, but I have a fundamental difficulty,
6 okay?

7 Bailey and Exploration Company, with
8 statutes not too dissimilar from this one, who read the
9 discovery rule into a fraud claim, both were a civil
10 litigant and for the government. The only way that I
11 can tease out a potential difference between Exploration
12 and this case is somehow that the penalty in this case
13 is not for injury but for punishment, as you called it.
14 Government as enforcer, rather than government as
15 victim.

16 Some of us would say that the common wheel
17 is injured whenever someone breaks a law, so that that
18 distinction between enforcer and victim makes no sense.

19 How do you answer that point?

20 MR. LIMAN: Justice Sotomayor, let me give
21 you the precise answer to that, which is that in this
22 case where the government is seeking a penalty, it is
23 not acting on behalf of underlying investors, and the
24 recovery is not one that is brought by way of damages or
25 disgorgement.

1 JUSTICE SOTOMAYOR: It's acting as a
2 sovereign to protect what it thinks is an ordered
3 society. And if you break that order, you are injuring
4 the society. That's the best --

5 MR. LIMAN: Your Honor, I think that is the
6 articulation that the government would have to make. I
7 don't think it holds up, for several reasons. First of
8 all, it would represent an extreme departure from
9 anything this Court has ever held or, to our knowledge,
10 any court has ever held with respect to the application
11 of the discovery rule.

12 Second, when you're talking about penalty,
13 you're not talking about recovery to victims. Third,
14 when we're talking about implying a rule, which is what
15 the Government's argument is here -- it's not an
16 argument to follow the plain language, it's an argument
17 to depart from the plain language -- you should look at,
18 and the cases direct you to look at the policy concerns.
19 And when you're talking about discover -- a discovery
20 rule with respect to the government as enforcer, the
21 rules don't work. They don't work for several reasons.

22 First of all, when you've got an injury, a
23 party who is injured, the statute of limitations has a
24 natural start date that is not in control of the
25 plaintiff. There is a relationship to the underlying

1 violation. And that can be readily measured. None of
2 that is true when you're talking about the government in
3 a law enforcement capacity.

4 JUSTICE KAGAN: Mr. Liman, what you
5 suggested, when we talked about the discovery rule, is
6 that it has a basis in the notion that a defendant with
7 unclean hands who has committed deceptive conduct
8 prevents then the plaintiff from understanding that he
9 or it has a cause of action, you know, shouldn't be
10 entitled to the benefit of a statute of limitations.

11 And if that's the understanding that lies
12 behind the discovery rule, I guess the question for you
13 is, why doesn't it apply in this case as well as in the
14 case where the person bringing the action has himself
15 suffered a harm?

16 MR. LIMAN: Justice Kagan, I've got two
17 answers to that question as well. The first is that --
18 that I don't think is the basis for -- for the discovery
19 rule at bottom. The basis for the discovery rule -- if
20 you look at this Court's opinion in Rotella, if you look
21 at the Seventh Circuit in Cada, the D.C. Circuit in
22 Connor -- is the notion that when the plaintiff cannot
23 discover the injury, doesn't know that it's been injured
24 and cannot reasonably know that the plaintiff's been
25 injured, the plaintiff cannot take the steps that other

1 plaintiffs would take to investigate and determine
2 whether they've got a cause of action.

3 That's not applicable in a government
4 enforcement context, because you're not talking about
5 there the government as a victim. The government may
6 not know of the underlying transaction, will not know of
7 the underlying transaction, unless the government asks.

8 The second reason is that there is a strain
9 that -- in the Bailey line of cases -- that really
10 speaks in terms of equitable tolling and fraudulent
11 concealment, that sort of a notion of unclean hands.
12 That's not in this case, because the government
13 affirmatively took it out. But we would submit --

14 JUSTICE GINSBURG: How did the government
15 take it out? I mean, the point here is that there was a
16 concealment. There was a hiding of what was the
17 impermissible action.

18 MR. LIMAN: That's not correct,
19 Justice Ginsburg. If you'd look at the -- at the
20 opinion below and you look at the complaint, the essence
21 of the allegation which we have not yet had a chance to
22 disprove before you on a motion to dismiss is that there
23 were misrepresentations and omissions made to the board
24 of the mutual fund. There was no misrepresentations
25 made to the investing public. That allegation is not in

1 the complaint. It would not be accurate. And there is
2 no allegation whatsoever that anything was hidden from
3 the government or was in any way concealed from the
4 government. The records here would have been
5 available -- were available for the government to look
6 at, at any time.

7 JUSTICE SOTOMAYOR: Mr. Liman, finishing up
8 a point you were just on previously, what's your
9 position with respect to fraudulent concealment?
10 Doesn't your theory preclude even the application of
11 that to tolling of the statute?

12 MR. LIMAN: Your Honor, I think you could
13 and should conclude that if you reach that issue. I
14 don't think you need to reach that issue.

15 JUSTICE SOTOMAYOR: But tell me about --

16 MR. LIMAN: Our theory doesn't require you
17 to come to that conclusion.

18 JUSTICE SOTOMAYOR: This is -- it's nice for
19 you to say that. But tell me, having announced your
20 theory, how the next step is avoidable? Under what
21 theory would we say you can't have a discovery rule, but
22 you can have a fraudulent concealment rule?

23 MR. LIMAN: Your Honor, in the -- using the
24 same type of theory and the same methodology that the
25 Court employed in the RICO context in the Claire case

1 and in the Rotella case, one can read the statute, I
2 think you have to read the statute, here to say that
3 "accrue" means accrue. It's the time that the
4 government can first sue.

5 That does not necessarily resolve the
6 question of whether there are equitable exceptions that
7 the government or any party could affirmatively assert
8 to toll the statute of limitations, not to delay the
9 accrual of the statute of limitations.

10 JUSTICE SCALIA: Mr. Liman, you acknowledge
11 that a civil action could be brought beginning from the
12 time when the injured plaintiff discovers the fraud,
13 right?

14 MR. LIMAN: That's --

15 JUSTICE SCALIA: So you're really not
16 arguing for what you might call a total statute of
17 repose. It seems to me odd that the defendant would be
18 relieved from prosecution by the government, but not
19 relieved from a suit for sometimes very substantial
20 damages by -- by an injured plaintiff who doesn't have
21 to sue until he's discovered the fraud.

22 MR. LIMAN: Your Honor, respectfully, we
23 think that's not odd at all. If you look in the
24 securities context, there is a 5-year statute of repose.
25 And it would be odd to think that the same Congress that

1 passed that 5-year statute of repose limiting even the
2 ability of an injured plaintiff without the tools of the
3 government to bring a private suit for damages, that's
4 the --

5 JUSTICE SCALIA: Sure. But that 5 years
6 doesn't begin to run until the private plaintiff
7 discovers the fraud, right?

8 MR. LIMAN: That's -- that's not correct,
9 Your Honor.

10 JUSTICE SCALIA: No?

11 MR. LIMAN: Under Title 28 1658(b) the 5
12 years runs from the time of the violation. It's exactly
13 coextensive 2462, and it's not an accident that it's
14 exactly coextensive.

15 JUSTICE GINSBURG: Mr. Liman, how does it
16 work with a disgorgement remedy? I take it that that's
17 still -- that you are not challenging the disgorgement?

18 MR. LIMAN: We are not challenging the
19 disgorgement in front of this Court, and if this Court
20 reverses the Second Circuit that issue will remain in
21 the case and the SEC's claim for disgorgement will
22 remain, and that's really been the way --

23 JUSTICE GINSBURG: But you don't apply --
24 you don't say it's too late for them to sue for
25 disgorgement?

1 MR. LIMAN: 2462 applies exclusively with
2 respect to penalties, fines and forfeitures. It does
3 not apply with respect to equitable remedies.

4 JUSTICE GINSBURG: So is there any statute
5 of limitations on disgorgement?

6 MR. LIMAN: There is none. There is none.

7 JUSTICE BREYER: Does it apply to Social
8 Security? Does it apply to Veterans Affairs?

9 MR. LIMAN: There is a Social Security
10 statute that --

11 JUSTICE BREYER: Does this statute apply to
12 Social Security?

13 MR. LIMAN: Yes.

14 JUSTICE BREYER: Does it apply to Veterans
15 Affairs? Yes or no or you don't know?

16 MR. LIMAN: I don't know about Veterans
17 Affairs.

18 JUSTICE BREYER: What about Social Security?

19 MR. LIMAN: Social Security, there is an
20 underlying statute --

21 JUSTICE BREYER: I'm asking about this
22 statute. Does it apply?

23 MR. LIMAN: The answer is yes. The answer
24 is yes. It applies to a broad range of statutes unless
25 Congress otherwise provided. In fact, there are very

1 few penalty statutes to which it does not apply.

2 JUSTICE BREYER: Defense Department?

3 MR. LIMAN: It does apply to a number of

4 Defense Department statutes. I'm hesitating --

5 JUSTICE BREYER: Antitrust?

6 MR. LIMAN: I'm not sure on antitrust. But

7 I believe that it applies to -- it does apply to a

8 number of unfair trade practices. Antitrust, there may

9 be a separate statute.

10 JUSTICE BREYER: FTC, you don't know?

11 MR. LIMAN: FTC, yes.

12 JUSTICE BREYER: It does apply to FTC, okay.

13 So Social Security, FTC. Veterans Affairs we don't

14 know, antitrust we don't know. Okay.

15 MR. LIMAN: One of the notable features,

16 Justice Breyer, is that if you look across the U.S.

17 Code, the government makes a point of saying: Well,

18 Congress uses penalty -- acknowledges that Congress has

19 used penalty when -- the word "penalty" when the

20 Congress has -- I'm sorry, it has used the word

21 "discovery" when Congress has wanted the statute to --

22 JUSTICE SOTOMAYOR: Mr. Liman, I'm a little

23 confused in your answer to Justice Scalia. You said

24 that the underlying case has a 5-year statute of repose

25 for a civil claim. It barely applies, however, those

1 claimants who have -- under your theory, who have been
2 directly injured. The presumption would apply of
3 discovery, if they were claiming a fraud.

4 MR. LIMAN: No, Your Honor.

5 JUSTICE SOTOMAYOR: So are you just arguing
6 that under this statutory scheme there is no application
7 of the discovery?

8 MR. LIMAN: This -- this Court has held in
9 the Lampf case that Bailey and Holmberg do not apply to
10 securities fraud case.

11 JUSTICE SOTOMAYOR: Because of the
12 alternative language of 5 years.

13 MR. LIMAN: Well, in Lampf it was 1-year and
14 3-year.

15 JUSTICE SOTOMAYOR: Right.

16 MR. LIMAN: And in the Merck case, the Court
17 made clear that the 5 years was the statute of -- the
18 statute of repose.

19 JUSTICE SOTOMAYOR: That's what I thought
20 those involved.

21 JUSTICE BREYER: Medicare, Medicaid?

22 MR. LIMAN: Yes.

23 JUSTICE KAGAN: It is true, though, isn't
24 it, that Justice Scalia pointed to an anomaly that could
25 easily exist in other contexts, because this isn't only

1 a statute about securities violations. So that you
2 might have in other contexts in which this statute
3 applies a world in which a private individual could sue,
4 but the government -- could sue after the -- the period
5 of time --

6 MR. LIMAN: Yes.

7 JUSTICE KAGAN: -- the 5 years, but the
8 government could not.

9 MR. LIMAN: Yes, Justice Kagan. And we
10 don't think that's an anomaly. We don't think it's an
11 anomaly for two reasons. First of all, in the private
12 context, as again I mentioned, the statute, the start
13 date for the statute of limitations is not in the
14 control of the plaintiff. That's a critical point.
15 It's critical in this Court's jurisprudence from Hubrick
16 forward. It -- there is a natural start date from when
17 the injury would be known to a reasonable plaintiff.
18 Not true with respect to the government, who may not
19 even know of the transaction. But what it -- so it's --
20 I don't think there's an anomaly because there are
21 different statutes of limitation.

22 JUSTICE KAGAN: And I take it that your view
23 would be that a case like Exploration, it's different
24 than this case because it does have a natural start
25 date; is that the idea?

1 MR. LIMAN: Number one, it does. And number
2 two, the relief being sought in Exploration was the
3 cancellation of a patent, so it was the government as a
4 party to a transaction. And what the Court really said
5 in Exploration, what the Court, in fact, said in
6 Exploration, is that there is no reason why the same
7 rule applied the same way couldn't benefit the
8 government as well as the private plaintiff.

9 What the government is seeking here is not
10 the same rule and would not be applied in the same way,
11 because you are talking about a transaction that is a,
12 frankly, a private transaction that there is no reason
13 that the government would know anything about. The
14 claim ultimately here is a claim about what was said in
15 a private conversation between the advisor to a mutual
16 fund and the mutual fund -- fund board.

17 So Exploration, what's notable is that the
18 government doesn't cite a single case where the
19 discovery rule has been applied to a party who is not a
20 victim or that it's been applied -- where it's been
21 applied and a penalty hasn't been -- a penalty has been
22 at issue. I mean, neither of those circumstances. We
23 are talking about a statute ultimately where the plain
24 language is clear and the government is invoking a
25 statutory canon not to try to interpret language of the

1 statute, not even to fill a gap in a statute, but to
2 override it. The canon that they say overrides the
3 plain language doesn't exist.

4 JUSTICE KENNEDY: In a civil -- in a civil
5 action brought by an injured investor or private party,
6 can that plaintiff, the injured investor, the private
7 party, in the ordinary course plead and rely upon an
8 earlier government determination that there had been a
9 violation and so that that's presumptive showing of
10 liability?

11 MR. LIMAN: Your Honor --

12 JUSTICE KENNEDY: In other words, the SEC
13 makes an investigation, find a violation; can a private
14 investor then rely on that as a presumptive showing of
15 liability?

16 MR. LIMAN: Yeah. I think the lower courts
17 are mixed on the extent to which you can rely upon the
18 actual allegations in a complaint.

19 JUSTICE KENNEDY: No, not the allegation.
20 It's an ultimate finding.

21 MR. LIMAN: Absolutely.

22 JUSTICE KENNEDY: But then under your rule.
23 The plaintiff would be deprived of that.

24 MR. LIMAN: No, that's not correct,
25 Your Honor. Under our rule the plaintiff has exactly

1 the same rights regardless of how this case is
2 determined. The plaintiff's cause of action will turn
3 upon the underlying --

4 JUSTICE KENNEDY: But if the government's
5 statute of limitations runs out and the private investor
6 is on his own, then the private investor doesn't have
7 the advantage that exists in other cases of reliance on
8 an SEC finding as a presumptive showing of liability.

9 MR. LIMAN: Your Honor, that -- that -- our
10 argument only applies with respect to penalty. The
11 government has huge powers with respect to disgorgement
12 and injunctive relief. So if the government believes
13 that there is a wrongdoing, the government still has the
14 ability to bring a claim and the private investors still
15 have the ability to rely upon the government's
16 enforcement action and whatever findings come out of
17 that. So there is nothing in our argument that
18 diminished to any degree the recovery abilities of a
19 private plaintiff.

20 In fact, as we've highlighted, that 5-year
21 period for the -- in the securities laws puts a premium
22 on the SEC acting promptly. And I would note that
23 that's something that is not accidental. If you go back
24 in the legislative history and look to the SEC's
25 reaction to the Lampf decision, the SEC urged a 5-year

1 statute of repose, saying that that struck in the
2 private context the right balance between repose when
3 you're dealing with complex commercial transactions and
4 enforcement and -- and recovery.

5 There's -- the position that the SEC is
6 taking now is a novel position that to our knowledge has
7 not been taken by other regulators and hasn't been taken
8 by the SEC until -- until quite recently. This
9 statute's been on the books for quite a long time, and
10 it's notable that agencies have not urged that -- that
11 interpretation.

12 JUSTICE GINSBURG: Are there no statutes,
13 Mr. Liman, that say the claim accrues when the injury is
14 discovered, that use both, both terms?

15 MR. LIMAN: I'm sorry, Justice Ginsburg. I
16 missed the question.

17 JUSTICE GINSBURG: Are there no statutes
18 that use both terms, "accrues" and "discovery"? A
19 statute, for example, that says: This claim accrues
20 when the injury is discovered?

21 MR. LIMAN: There are statutes that use that
22 kind of language, and that's precisely our point,
23 because it reflects that Congress recognizes the
24 difference and could, if Congress wanted, provide that a
25 claim for the violation of the IAA or for any other

1 statute accrues when it is discovered.

2 If there are no further questions, I would
3 like to reserve the remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Wall.

6 ORAL ARGUMENT OF JEFFREY B. WALL

7 ON BEHALF OF THE RESPONDENT

8 MR. WALL: Mr. Chief Justice and may it
9 please the Court:

10 I think Justice Kennedy started us off in
11 the right place by focusing on the statute and its use
12 of the term "accrual." And when counsel concedes that
13 that term had an established meaning at common law and
14 this statute picks it up, I think he gave away his case,
15 because there were a cluster of concepts. One was the
16 general rule governing accrual: It accrues when the
17 plaintiff can -- has a right to sue.

18 But there was a specific principle for cases
19 of fraud and concealment. And I don't think there is
20 any basis in law or logic for petitioner saying that
21 this statute meant to pick up one of those concepts and
22 not the other concept.

23 JUSTICE SCALIA: I don't think the common
24 law held that it didn't accrue. I think it was an
25 exception to the accrual rule, that, even though it

1 accrued earlier, we are going to allow a later suit
2 where -- where discovery is made later. Is that the way
3 those cases were framed, that it didn't accrue until
4 discovery?

5 MR. WALL: Justice Scalia, I don't want to
6 fight about it too much because from the government's
7 perspective, it doesn't matter --

8 JUSTICE SCALIA: Well, you are making the
9 argument, so you ought to fight about it.

10 MR. WALL: It doesn't matter how it's
11 labeled. It doesn't matter whether we label it as an
12 interpretation of the statute or an exception for cases
13 of fraud or concealment. The result is the same.

14 But I will say you are right, in some cases
15 it was described as an exception, but as long ago as
16 Kirby in 1887 and as recently as Merck --

17 JUSTICE SCALIA: And never in a criminal
18 case, right? Do you have a single case in which the
19 discovery rule was -- was applied in a criminal case
20 with respect to a penalty or a criminal sanction?

21 MR. WALL: No, not in --

22 JUSTICE SCALIA: Not a single one.

23 MR. WALL: Well, no. The criminal context
24 is fundamentally different. This Court has said that
25 those statutes are construed liberally in favor of

1 repose and are presumptively not subject to --

2 JUSTICE BREYER: Now, that's the question,
3 because I certainly agree with Justice Scalia that this
4 is not an SEC statute, this is not a securities statute;
5 it is a statute that applies to all government actions,
6 which is a huge category across the board and it's about
7 200 years old.

8 And until 2004 I haven't found a single case
9 in which the government ever tried to assert the
10 discovery rule where what they were seeking was a civil
11 penalty, not to try to make themselves whole where they
12 are a victim, with one exception, a case called Maillard
13 in the 19th century where they did make that assertion.
14 They were struck down by the district court, and the
15 attorney general in his opinion said: The district
16 court's absolutely right; of course, the government
17 cannot effectively abolish the statute of limitations
18 where what they're trying to do is to gather something
19 that's so close to a criminal case.

20 Okay. So my question is: Is there any case
21 at all until the year 2004, approximately, in which the
22 government has either tried or certainly succeeded in
23 taking this general statute and applying the discovery
24 rule where they are not a victim, they are trying to
25 enforce the law for the civil penalty?

1 The reason I brought up Social Security,
2 Veteran's Affairs, Medicare, is it seems to me to have
3 enormous consequences for the government suddenly to try
4 to assert a quasi-criminal penalty and abolish the
5 statute of limitations, I mean, in a vast set of cases.
6 And that -- you know, I have overstated that last remark
7 a little bit, but I want you to see where I'm coming
8 from, which isn't so different from the -- from the
9 questions that have been put to you.

10 MR. WALL: Justice Breyer, most or many of
11 the penalty claims that are being brought under Section
12 2462 and other penalty statutes don't deal with fraud or
13 concealment, and I grant you that it is --

14 JUSTICE BREYER: All I'm asking you for is
15 one case.

16 MR. WALL: So in -- it's a problem of fairly
17 recent vintage, to be sure --

18 JUSTICE BREYER: No, it is not a problem of
19 fairly recent vintage. I'd say for 200 years there is
20 no case. The only case, as far as I have been able to
21 discover, which is why I am asking, is that what created
22 the problem of recent vintage is that the Seventh
23 Circuit, I guess, or a couple of other circuits decided
24 that this discovery rule did apply to an effort by the
25 government to assert a civil penalty. That's what

1 created the problem. Before that there was no problem;
2 it was clear the government couldn't do it.

3 All right. Now, you will tell me that I'm
4 wrong by citing some cases that show I'm wrong. And
5 that's what I'm asking. I want to be told I'm wrong,
6 sort of.

7 (Laughter.)

8 MR. WALL: And I guess what I want to tell
9 you is there aren't cases out there one way or the
10 other. There aren't cases endorsing or declining to
11 adopt the discovery rule in the context of fraud or
12 concealment with civil penalty actions --

13 JUSTICE SCALIA: You'd expect that - you'd
14 expect there to be some cases in a couple of hundred
15 years.

16 JUSTICE BREYER: No, I haven't found one.

17 JUSTICE SCALIA: Fraud is nothing new, for
18 Pete's sake.

19 MR. WALL: Justice Scalia, it's not that --

20 JUSTICE SCALIA: This is brand-new assertion
21 by the government that -- tell -- is there much
22 difference between the rule you are arguing for and a
23 rule that there is no statute of limitations?

24 MR. WALL: Absolutely there is. Since --
25 look. In 1990 the Commission was given the right to

1 seek civil penalties, so it could only have brought
2 these actions for the last 20 years. In those
3 20-plus years, we have seen 25 reported cases dealing
4 with 2462 and civil penalties. In 19 of those cases,
5 the Commission brought its action within 5 years of the
6 end of the fraud. It used the discovery rule only to
7 reach back and get the beginning of the fraud.

8 CHIEF JUSTICE ROBERTS: Well, but that
9 ignores the point that has been raised, is that this
10 statute does not just apply in the SEC context. How
11 many cases have you found across the board in the range
12 of those areas that Justice Breyer catalogued?

13 MR. WALL: There are cases from the 1980s
14 and 1990s dealing with concealment, and in our view the
15 justification is the same for concealment as fraud.

16 JUSTICE BREYER: I mean, we are asking the
17 same question, but in 30 seconds I am going to conclude
18 there is none. What I want is a case before the year
19 2000 in which the government sought a civil penalty and
20 was not trying to recover money or land that it had
21 lost, and I want the name of that case in which they
22 said that the discovery rule applies.

23 The two that you cited, Amy and the Case of
24 Broderick's Will, did involve the government being
25 injured by losing land or losing money, something like

1 that. So I have those and I don't think they count, but
2 I will look at them again. Is there anything else you
3 would like to refer me to?

4 MR. WALL: Justice Breyer, I don't think
5 there is anything on either side of the ledger, I will
6 be very upfront, other than the Maillard case, which I
7 think even courts at the time, an exploration company,
8 the court of appeals recognized --

9 JUSTICE SCALIA: It's not a matter of there
10 being nothing on either side of the ledger. What's
11 extraordinary is that the government has never asserted
12 this, except in the 19th century, when it was rebuffed
13 and repudiated its position. It isn't just that there
14 are no cases against you. It's you've never -- the
15 government has never asserted it before.

16 MR. WALL: Justice Scalia, there were very
17 few civil penalty actions in which -- that involved
18 fraud or concealment, in which the government would have
19 needed to invoke it, or did invoke it and was rebuffed
20 by courts. I mean, this is a fairly modern problem, and
21 the question is do all of the same concepts that
22 compelled one answer in these other contexts compel the
23 same answer here or does a rule that blankets the
24 waterfront --

25 JUSTICE SOTOMAYOR: This a very modern

1 problem, but how about the statute of Elizabeth, which
2 talked about penalties as being a criminal sanction but
3 permitted private individuals, not the government, to
4 seek the penalties and keep it. So you cite the statute
5 of James and I look at the statute of Elizabeth and try
6 to find the analogy between which one.

7 MR. WALL: Well, if this were a criminal
8 penalty, the government agrees --

9 JUSTICE SOTOMAYOR: Even though private
10 parties could keep the money back then.

11 MR. WALL: That's right. But what the
12 Court's been clear on is that there are civil penalties
13 and there are criminal penalties and which side of the
14 line it falls on invokes a different set of background
15 rules and legal norms. The Congress denominated this as
16 a civil penalty --

17 JUSTICE SOTOMAYOR: Could I move you to
18 another issue? If a party can defeat the government's
19 claim of discovery by showing that the government wasn't
20 reasonably diligent, how does a party ever accomplish
21 that? Aren't you going to raise the law enforcement
22 privilege, the -- some other privilege to block
23 discovery?

24 MR. WALL: Justice Sotomayor, discovery is
25 playing itself out in cases like these in district

1 courts. Privilege has not been a very major issue and
2 the reason is defendants are by and large pointing to
3 things in the public domain -- private lawsuits, public
4 filings with the Commission, public statements -- to say
5 those put the Commission on constructive --

6 JUSTICE SOTOMAYOR: Well, if they fail
7 there, don't you think that they are going to also fail
8 because they are not going to be able to look at your
9 records to figure out exactly what you knew or didn't
10 know?

11 MR. WALL: No, not invariably. I mean, the
12 way this plays itself out in the district court is the
13 Commission says that it didn't know and a defendant
14 points to something in the public domain and says either
15 that put you on constructive notice or --

16 CHIEF JUSTICE ROBERTS: So it depends really
17 on how many enforcement officers the SEC has, is it
18 reasonable for them to have been aware of the particular
19 item in some publication. Maybe if they've got 1,000
20 people reviewing it, but maybe not if they have 10; and
21 that's just not the -- I mean, it's not just the SEC;
22 it's all these other government areas.

23 It seems to me that it's going to be almost
24 impossible for somebody to prove that the government
25 should have known about something. And which part of

1 the government? I mean, it's a big, big government, and
2 particular agencies -- well, you say, well, the Defense
3 Contractor Board should have known, but does that mean
4 that the U.S. attorney's office or the defense counsel's
5 office should have known?

6 It seems to me that, at least with respect
7 to that aspect, you really are eliminating any real --
8 it's certainly not a lot of repose if the idea is, well,
9 I've got to establish that this particular government
10 agency should have known about this.

11 You certainly can't sit back and say, well,
12 5 years has gone by and --

13 MR. WALL: Mr. Chief Justice, they can't
14 point to a single case where it has been difficult here,
15 and it hasn't been difficult --

16 CHIEF JUSTICE ROBERTS: They can't point to
17 a single case?

18 MR. WALL: Where it's been difficult in
19 order to make that determination. And it hasn't proven
20 difficult --

21 CHIEF JUSTICE ROBERTS: So you think it's
22 significant if you can't point to a single case?

23 MR. WALL: Well, I think there are -- where
24 you should expect those cases to exist, yes.

25 JUSTICE KENNEDY: Are there cases discussing

1 whether or not a government agency has been diligent in
2 pursuing a fraud, a fraud investigation? You see, in
3 the private context we have some sense of what the
4 plaintiff has to do to protect the plaintiff's rights.
5 He has to be diligent. But to transpose that to a
6 governmental agency -- suppose the agency's overworked
7 or underfunded? I don't -- which way do you come out
8 when the government says that?

9 MR. WALL: Justice Kennedy, not just this
10 statute. There are other statutes, the False Claims Act
11 and others, that have specific provisions requiring
12 courts to determine when a government official would
13 reasonably have been on notice of certain circumstances.
14 That hasn't proven difficult in those contexts. It's
15 not difficult here.

16 JUSTICE ALITO: What about the question that
17 Justice Kennedy just asked? What if a claim could have
18 reasonably been discovered by a government agency if it
19 had more resources, but given the resources that it had
20 it couldn't have reasonably discovered the claim? Would
21 the discovery rule apply there?

22 MR. WALL: I don't think so, Justice Alito.
23 I mean, I think we could say that there might be
24 circumstances where the Commission would be on
25 constructive notice and not a private plaintiff because

1 of its expertise. It would see something in the public
2 domain that should be meaningful to it that might not be
3 meaningful to a private plaintiff.

4 JUSTICE SCALIA: The False Claims Act
5 example you give is indeed a private plaintiff kind of a
6 case.

7 MR. WALL: That's --

8 JUSTICE SCALIA: Yes, you can say the
9 government, having been cheated, should have known it
10 was cheated. But we are talking here about prosecution,
11 essentially, prosecution for a civil penalty rather than
12 a criminal. By the way, doesn't the rule of lenity
13 apply whether the penalty is criminal or civil? So if I
14 think the word "accrual" is at best ambiguous, shouldn't
15 the tie go to the defendant?

16 MR. WALL: No. The court's been very -- I
17 mean, in all of the civil cases applying the fraud
18 discovery rule, the court has never looked to the
19 criminal analogies. The canon here is that ambiguities
20 get construed for the sovereign, not against it.

21 JUSTICE SCALIA: But my question is broader
22 than that. Does the rule of lenity not apply to all
23 penalties?

24 MR. WALL: I don't think it applies in the
25 context of a civil penalty. I don't think the -- I

1 don't think --

2 JUSTICE SCALIA: Are you sure of that? My
3 belief is the contrary.

4 MR. WALL: I can't say that I focused on it
5 specifically, but I think if the Petitioner said --

6 JUSTICE SCALIA: Well, it's an important
7 issue in this case surely. I mean, if "accrual" is
8 ambiguous and we have a rule of lenity, we should
9 interpret it to favor the defendant.

10 MR. WALL: Justice Scalia, I don't --
11 Petitioner certainly couldn't claim that this civil
12 penalty should have to be proved beyond a reasonable
13 doubt, or that they are entitled to a constitutional
14 right to counsel. I don't know why one legal norm among
15 them all should change in the civil context and not the
16 others.

17 JUSTICE BREYER: The reason would be that
18 the -- you know, once you start talking about applying
19 this to Social Security, for example, or to Medicare,
20 for example, or to DOD, for example, you have somebody
21 who did commit some fraud and they kept the money. You
22 know, she had five children not four, or she has five,
23 not six. And I can understand it being fair when the
24 Government catches her, you know, 18 years later, they
25 say, We want our money back. Okay. I say that's fair,

1 not necessarily merciful but fair.

2 But then to go and say, and in addition we
3 want this civil penalty, even though -- of course, we
4 couldn't have discovered it. Don't you know there are 4
5 million people who get Social Security or 40 million or
6 something, and we can't police every one. So suddenly,
7 I see I am opening the door, not just to getting your
8 money back but to also you're having what looked like
9 criminal penalties years later without much benefit of a
10 statute of limitations.

11 That is at the back of my mind. And I'd
12 like to know, having brought it up front, what your
13 response is.

14 MR. WALL: Absolutely. There are anomalies
15 on both sides of the coin and I just want to touch on
16 both very briefly. Take the example you gave. In that
17 situation, the defendant's fraud or concealment the
18 would allow it or him to escape paying civil penalties
19 but not private damages.

20 JUSTICE BREYER: That's right.

21 MR. WALL: This Court has never privileged a
22 private lawsuit above a Government enforcement action in
23 a securities context --

24 JUSTICE BREYER: This is not the securities
25 context. This is the context of -- that's why I started

1 down the road I was down.

2 MR. WALL: But even in that context, imagine
3 if there's a private right of action, the private
4 plaintiff will be able to recover damages and the
5 Government will not --

6 JUSTICE BREYER: Yes, because you have two
7 people who are hurt, where two people have been hurt.
8 For example, I wrote the case in *Burk* and we had the
9 statute of limitations and Congress focused on this.
10 And it wrote a two-tier statute. And it wrote a
11 two-tier statute in large part because it was concerned
12 about the problem you mention. You have a victim. So
13 you're either going to let the defendant keep the money
14 or the victim gets it back. I understand that. B.

15 Ut this is not that context. This is like a
16 criminal context where not only are you getting your
17 money back, but you also want to assess a kind of
18 criminal penalty, and in that situation, I see a pretty
19 clear line and I don't understand why the Government is
20 so anxious to change what has long been the apparent --

21 MR. WALL: Just imagine the opposite, which
22 is far more dangerous. Imagine a bank makes a bad loan
23 to a veteran or a bank tells the FDIC that it's gotten
24 mortgage insurance to help lower income families buy
25 homes and then that fraud or falsity escapes detection

1 for five years. The Veterans Administration or the FHA
2 then is barred from bringing a civil penalty action, and
3 there is no private right of action.

4 JUSTICE BREYER: That's correct, you have a
5 fraud and you can't put them in jail either, but you can
6 get your money back.

7 MR. WALL: But the reason there's no private
8 right of action in those contexts is in part because
9 government agencies can seek civil penalties. And I
10 cannot imagine that the Congress, which allowed agencies
11 to seek civil penalties, where here they had existing
12 remedies, would have thought that the only people who
13 could get away without paying them are the ones who
14 commit fraud or concealment and that remains hidden for
15 five years.

16 CHIEF JUSTICE ROBERTS: And the reason --
17 the reason there's no private action -- right of action
18 is not because the Government could seek civil
19 penalties, it's because Congress hasn't provided a
20 private right of action.

21 MR. WALL: That's right, because it thought
22 that the agencies could seek civil penalties and that
23 was sufficient.

24 JUSTICE BREYER: Oh, no, you can't --

25 CHIEF JUSTICE ROBERTS: But it didn't -- it

1 didn't necessarily think, and that's why we have a case,
2 that they could seek civil penalties 10 years later,
3 18 years later, however long, so long as they were busy
4 doing other things and didn't have a chance to know.

5 MR. WALL: No question. And in the average
6 typical case, the time that Congress afforded is enough
7 and we're not here claiming any different, but that --

8 JUSTICE GINSBURG: And it is a generous
9 period. It's 5 years. And, Mr. Wall, maybe you can
10 explain the SEC's pursuit of this -- of this case. The
11 alleged fraud went on from 1999 to 2002. It was
12 discovered in 2003. The SEC waited from 2003 to 2008 to
13 commence suit. What -- what is the reason for -- for
14 the delay from the time of discovery till the time suit
15 is instituted?

16 MR. WALL: Justice Ginsburg, there was a lot
17 of back and forth between the parties, document
18 exchanges, they wanted to make additional submissions.
19 The Government hoped that there would be a settlement
20 that would encompass all the defendants. Ultimately,
21 there was a settlement that only went to the fund and
22 petitioners did not settle and then the Government put
23 together and brought its case.

24 JUSTICE KAGAN: But, Mr. Wall, I'll go even
25 further than Justice Ginsburg. And this case actually

1 seems to me a good example when Mr. Liman said there's
2 no natural starting point and Justice Kennedy and
3 Justice Alito referred to just -- this is a -- this is a
4 decision about enforcement priorities. The Government
5 had decided not to go after market timers. And it
6 changed its decision when a State attorney general
7 decided to do it, and it embarrassed them that they had
8 made that enforcement priority decision, and then the
9 Government made a different enforcement priority
10 decision. But that's not the kind of situation that the
11 discovery rule was intended to operate on, is it?

12 MR. WALL: Justice Kagan, I don't think
13 that's fair. We didn't go -- it wasn't market timing
14 that we discovered. What General Spitzer announced was
15 there are advisors that are permitting market timing,
16 but misleading investors about it and they're doing it
17 in return for investments in other funds that they
18 manage, what are called sticky asset agreements, and
19 then we started doing market sweeps for those
20 agreements.

21 And I don't think we can ignore the evidence
22 here, because we shouldn't decide the case based on
23 feverish hypotheticals. There are 25 reported cases
24 brought by the Commission involving this statute, 19
25 were brought within 5 years and they were just reaching

1 back to pick up the beginning of the fraud. And the
2 other six, including this case, the longest lag time was
3 six and a half years from the end of the fraud to
4 bringing the complaint.

5 And the reason is these are dynamic markets.
6 There's a lot going on in the public domain that puts
7 the commission on notice, inquiry or constructive, and
8 starts the clock running. Not only have we not seen a
9 10, a 15, a 20-year case, we haven't seen a 7-year case.

10 JUSTICE BREYER: Well, if all that's true,
11 and this is a point I want you to -- I'm not sure I am
12 right about this point, but remember your banking case
13 now, we're sounding like that, I thought -- doesn't the
14 doctrine of fraudulent concealment still apply? That
15 is, if the defendant, in fact, takes any affirmative
16 action to hide what's going on, the statute will be
17 tolled. Is that right?

18 MR. WALL: That's right, but that --

19 JUSTICE BREYER: All right. As long as
20 that's right, then in all your banking cases, there are
21 bank inspectors all over these banks, I hope, you know,
22 about once a month or so --

23 MR. WALL: But Justice Breyer, that's --

24 JUSTICE BREYER: -- or once a year. And so
25 the chance of there -- the chance of this somehow

1 escaping notice without fraudulent concealment, which
2 would allow the Government to extend the toll strikes me
3 as small, but am I right?

4 MR. WALL: Justice Breyer, I want to be
5 clear. In the government's view, the concealment would
6 apply, though petitioners or others like them will be
7 back here making exactly the same arguments. The
8 government's point is just that equity fraud and
9 concealment were a pair and the justification was the
10 same for both.

11 JUSTICE KENNEDY: Well, perhaps I've missed
12 something. I -- I came in here thinking that both
13 parties were willing to concede for purposes of this
14 case that there was a fraudulent concealment. Is
15 that -- is that wrong?

16 MR. WALL: I -- I --

17 JUSTICE KENNEDY: I mean, for purposes of
18 presenting the statute of limitations issue that's
19 before us.

20 MR. WALL: I don't think the petitioners are
21 disputing it here, but I think Mr. Liman acknowledged
22 earlier that if pressed, his arguments could be
23 leveraged to get rid of the concealment doctrine, too.

24 JUSTICE SCALIA: He didn't concede that
25 there was fraudulent concealment. All he conceded is

1 that there was fraud, but later concealment to cover up
2 that fraud I don't think has been conceded.

3 MR. WALL: Oh, no, no, not -- I didn't --
4 I'm sorry, Justice Scalia. I wasn't trying to mislead.
5 This is not a concealment case. This is a fraud case.

6 JUSTICE BREYER: I thought it was the
7 opposite. In other words, I thought both parties, for
8 purposes of this argument, are assuming fraudulent
9 concealment has nothing to do with it. We are not to
10 consider fraudulent concealment.

11 MR. WALL: This is a fraud case, not a
12 concealment case.

13 JUSTICE BREYER: Am I right when I say that?

14 MR. WALL: Yes. I was just trying to say
15 that once you say there is a concealment exception, the
16 fraud exception follows from equity because they were of
17 a piece. And once you say there is not a fraud
18 exception, the same arguments will be leveraged to get
19 rid of a concealment exception. And the reason that
20 equity treated them as -- of a piece was the deception
21 was the same. The fraud was self-concealing or even if
22 it was non-fraud, the defendant could conceal, but
23 either way --

24 JUSTICE SCALIA: Except that concealment is
25 sort -- you know, it's sort of a self-starter. You --

1 you -- it -- it doesn't apply always. It applies when
2 there is concealment, and the person who is being
3 subjected to the longer statute of limitations is on
4 notice that if he fraudulently conceals, he's extending
5 the statute. So I -- I don't think that the one has to
6 go with the other. Maybe they're both equitable
7 doctrines, but that doesn't -- that doesn't mean that we
8 have to apply them to this statute.

9 MR. WALL: Justice Scalia, for 300 years,
10 English and American courts looking at this problem have
11 said where the defendant's misconduct, be it fraud or be
12 it concealment of a non-fraud, but where the defendant's
13 deception prevents a plaintiff from knowing that he, she
14 or it has a cause of action, equity suspends the running
15 of a statute of limitations. Those -- that has been --

16 JUSTICE SCALIA: And for 300 years, that has
17 been said only with respect to civil actions, not with
18 respect to the government's attempt to exact a penalty.

19 JUSTICE BREYER: That's correct.

20 MR. WALL: Justice Scalia, this is a civil
21 action. I don't think even petitioners are disputing
22 that.

23 JUSTICE BREYER: I assume that we are on the
24 same ground, but I don't know that you have -- I mean,
25 I'm worried about your giving up the fraudulent

1 concealment. I mean, you wouldn't give up equitable
2 estoppel, would you?

3 MR. WALL: If I gave up anything on
4 fraudulent concealment --

5 JUSTICE BREYER: No, no, no. I mean -- I
6 mean, there's nothing --

7 (Laughter.)

8 MR. WALL: I want to be very clear.

9 JUSTICE BREYER: If we were to say -- if
10 we -- if the Court were to hold, it seemed to me, and
11 this is again tentative to get your response, but if the
12 -- if the Court were to hold the discovery doesn't --
13 rule doesn't apply, there's nothing in that that says
14 equitable -- equitable tolling doesn't apply, nothing in
15 that that says equitable estoppel doesn't apply, nothing
16 in that that says fraudulent concealment doesn't apply.

17 Now, you've shaken me a little bit on the
18 fraudulent concealment, but I don't know about the other
19 two.

20 MR. WALL: Well, all the same arguments are
21 going to apply. Petitioners --

22 JUSTICE BREYER: Oh, not the equitable
23 estoppel.

24 MR. WALL: Oh, sure.

25 JUSTICE BREYER: Equitable estoppel, the

1 person comes in and says: Oh, yes, I'll tell you all
2 about what I did, but by the way, I won't assert a
3 statute of limitations defense, I promise. And the
4 Court says: Hey, you just asserted one, you can't.

5 MR. WALL: Justice Breyer, petitioners in a
6 future case would be back here saying: The text of the
7 statute says nothing about equitable estoppel. And even
8 if you've applied it to everybody else's actions, you
9 can't apply it to me because I'm somehow --

10 JUSTICE SCALIA: And you will say nonsense
11 in that future case, won't you?

12 (Laughter.)

13 MR. WALL: That's -- I'll be as right then
14 as I am now.

15 (Laughter.)

16 MR. WALL: I mean, petitioners' argument has
17 this sort air of unreality. You've applied it
18 everywhere else he says, but not to me. Think how odd
19 that is, Justice Scalia, that where you have a
20 background canon that says ambiguities get construed for
21 and not against the sovereign. When the sovereign sues
22 quasi-sovereign to enforce the laws, that is somehow a
23 subordinate interest and the sovereign alone cannot take
24 advantage of the Fraud Discovery Rule.

25 JUSTICE KAGAN: Mr. Wall, why is it that you

1 don't you have any cases? I mean, you said way back
2 when: This didn't come up, this is a modern problem.
3 So explain to me why this is a modern problem. This is
4 obviously an old statute. Are you saying that this
5 statute has not been used very -- was not used very much
6 until very, very recently?

7 MR. WALL: There are -- that's right. There
8 are very few cases that deal with this statute at all,
9 and obviously in this context, because the Commission's
10 only had the ability to bring civil penalties for about
11 20 years.

12 But I think that is not a problem unknown to
13 the law. Again and again, facing garden variety
14 limitations provisions written just like this one, this
15 Court applied the fraud discovery rule. And now they
16 come in and say: Oh, but you've never applied it to
17 this statute. That's true, but everything about this
18 statute is identical as a matter of text and history to
19 the statute of Bailey.

20 The cause of action equally accrued there,
21 and this Court's applied it across bankruptcies, land,
22 patent cases --

23 JUSTICE KAGAN: But what you're running up
24 against is a skepticism, that, you know, the government,
25 which has not asserted this power for 200 years, is now

1 coming in and saying we want this. And the question is
2 why hasn't the government asserted this power
3 previously?

4 MR. WALL: There are just very few cases on
5 it. I think there are very few civil penalty actions
6 that are being brought at all, certainly to which this
7 statute apply, and certainly that deal with fraud or
8 concealment and reach outside the 5-year period. And I
9 don't have a great answer for why there aren't cases.
10 All I can tell you is that -- it isn't like there are
11 cases rejecting our arguments. We just see an absence
12 of case law.

13 But what we do see is cases like Exploration
14 Company, where the government comes in, is really suing
15 in a sovereign capacity, to redistribute land from some
16 private land owners to another by annulling their
17 patents. And this Court rejects basically exactly the
18 same arguments Petitioners are making and says it
19 applies equally to the government when it brings an
20 action as to private plaintiffs.

21 Now, an action for civil penalties? No, the
22 relief here is a little different, but if one looks back
23 at the briefs the arguments are exactly the same. They
24 made exactly the same claims that the sky was falling
25 there, and for 100 years they have not been true. There

1 is nothing important about this statute as a matter of
2 text, structure or anything else from the other statutes
3 to which this Court has again and again applied the
4 rule. And the justification is the same. It's the
5 defendant's misconduct which keeps the plaintiff from
6 knowing of her cause of action.

7 CHIEF JUSTICE ROBERTS: Counsel, you made
8 the point earlier that it would be very odd that it's
9 only the sovereign that doesn't benefit from the
10 discovery rule when other people can. But it's when
11 it's the sovereign that's bringing the action that the
12 concerns about repose are particularly presented. You
13 know, the sovereign, with all of its resources, can
14 decide to go after whomever it discovers, however many
15 years after -- whether it's the Social Security
16 recipient that Justice Breyer mentioned or anyone else.

17 So I at least don't find it unusual that
18 it's the sovereign in particular that doesn't get the
19 benefit of whenever you happen to find about it rule.

20 MR. WALL: No question in the typical case,
21 but what equity has always said is in cases of fraud or
22 concealment the defendant is not entitled to repose
23 until there is discovery of the fraud. And equity has
24 never looked at the identity of the plaintiff, the
25 elements of the cause of action, the plaintiff's status,

1 role, party to what happened in the case. That is
2 never --

3 CHIEF JUSTICE ROBERTS: Would you agree that
4 when we're talking about the interests in repose that
5 the one plaintiff that we should be particularly
6 concerned about is the government?

7 MR. WALL: I don't think that there's a
8 basis for separating as between private damages lawsuits
9 and civil penalties. I think when Congress sets a
10 statute of limitations, that's a limitation on the
11 various forms of --

12 JUSTICE SCALIA: What about criminal
13 penalties? Would your argument be different with regard
14 to criminal?

15 MR. WALL: Justice Scalia --

16 JUSTICE SCALIA: Incidentally, what makes
17 something a civil penalty? You just call it a civil
18 penalty and you don't have to prove it beyond a
19 reasonable doubt, and you get the benefit of this
20 extension that you are arguing for?

21 MR. WALL: Justice Scalia, two very
22 important things. Yes, our argument would absolutely be
23 different in a criminal context. In cases like Marion
24 and Toussie, this Court has explained how statutes of
25 limitations function in the criminal context is very

1 different. They are presumptively not equitably tolled,
2 whereas civil statutes are presumptively equitably
3 tolled.

4 JUSTICE SCALIA: What makes a penalty a
5 civil penalty?

6 MR. WALL: In Hudson v. United States --

7 JUSTICE SCALIA: I mean, a penalty is a
8 penalty as far as I'm concerned if the Government's
9 taking money from you.

10 MR. WALL: Justice Scalia, the Court walked
11 through in Hudson v. United States the test for
12 denominating a civil from a criminal penalty. The main
13 thing is what Congress denominates it, although you can
14 look behind that.

15 JUSTICE SCALIA: That's nice.

16 MR. WALL: Here, there is no question that
17 this is a civil penalty. It was denominated by Congress
18 that way, it functions that way, it is phrased that way.
19 I think even Petitioners and all of their amici -- not a
20 single person on that side of the case has attempted to
21 argue this penalty is criminal rather than civil under
22 Hudson.

23 JUSTICE SCALIA: That isn't my point, that
24 it is criminal. My point is, it doesn't seem to me to
25 make a whole lot of difference as far as these issues

1 are concerned.

2 MR. WALL: Justice Scalia, the Court has
3 always said that whether the penalty is civil or
4 criminal carries with it a different set of legal rules
5 or norms, and no party has ever successfully come into
6 court and said, well, it may be civil, but it's a little
7 criminal-like, so I should borrow from the criminal
8 context.

9 CHIEF JUSTICE ROBERTS: What about the
10 Halper case?

11 MR. WALL: Mr. Chief Justice, I think Hudson
12 overruled Halper in large part, and no one here has
13 asked this Court to label this a criminal penalty. They
14 have asked the Court to call this a civil penalty and
15 yet say the fraud discovery rule does not apply. That,
16 there is no precedent for.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Liman, you have 5 minutes remaining.

19 REBUTTAL ARGUMENT OF LEWIS LIMAN

20 ON BEHALF OF THE PETITIONERS

21 MR. LIMAN: Just a few points in rebuttal.

22 First of all, with respect to whether this
23 is a criminal penalty and whether the rules of lenity
24 apply, this Court has held in the Commissioner v.
25 Ackerly case that the rule of lenity applies to civil

1 penalties.

2 Just as an --

3 CHIEF JUSTICE ROBERTS: I'm sorry. What
4 case?

5 MR. LIMAN: I believe it's Commissioner
6 against Ackerly. It's cited in one of the amicus
7 briefs.

8 Second, the concession that you just heard a
9 moment ago, that the statute would not apply as the
10 government says it should apply if this was deemed to be
11 a criminal penalty, we submit under this Court's
12 reasoning in Clark v. Martinez, it just gave away the
13 store in the government's case, because if it is
14 possible -- if the government has now admitted it's
15 possible -- and I don't want to get into all of the
16 permutations of Hudson -- but if it is possible that the
17 label of civil penalty does not -- is not dispositive as
18 to whether a penalty is civil or criminal, then, as the
19 Court held in Clark v. Martinez, the lowest common
20 denominator applies.

21 One has to interpret this statute so that it
22 is applicable across the range of statutes. And if
23 that's so, then it follows, it runs from accrual as that
24 word is commonly understood.

25 Next point. The Government said that there

1 are no cases where the Court considered the claim that
2 it is making. We would point the Court's attention to
3 the Rotella case, in which in the context of a private
4 plaintiff who did not have the resources of the
5 government, the argument was made that the RICO statute
6 should have a discovery of the violation type principle.

7 And the argument was made there that RICO
8 can encompass a pattern of fraudulent acts. And the
9 plaintiff in that case said, as the government says
10 here, fraud can be concealed, can be complex, can be
11 difficult to discover.

12 And the Court unanimously had a response to
13 that. The response was that, at least as soon as you
14 know the injury, where there is an injury element, the
15 difficulty of discovery of the actual violation doesn't
16 defer the running of the statute of limitations. It
17 would defeat the purposes of the statute of limitations.

18 The Government also argued that the problems
19 of privilege are not significant ones. We would point
20 the Court's attention to the Joint Appendix in the
21 Second Circuit, where the Government asserted privilege
22 with respect to our questions about its investigations
23 of the counterparty to this alleged quid pro quo.

24 The Court also asked a question of whether
25 there are any cases in which courts have dealt with

1 government agencies being diligent, and the claim being
2 the government agency was not diligent. The Court has
3 dealt with that in a related context, in the
4 Heckler v. Cheney context. And in the Heckler v. Cheney
5 context the Court held that that type of issue, how an
6 administrative agency treats facts that are -- that it
7 discovers and whether it chooses to bring a claim or
8 not, whether it chooses to believe that they are in
9 violation of a statute, the agency is charged with
10 administering is not fit for judicial review. No
11 different result should apply here.

12 Just two more points. The False Claims Act
13 has a -- which has an explicit discovery rule, also has
14 a statute of repose. It would be very odd, indeed, if
15 the one circumstance where Congress, one of the few
16 circumstances where Congress chose to use the word
17 "discovery," was where the government was injured, and
18 Congress chose to impose a statute of repose, where, as
19 they say in the 100 or other statutes that use language,
20 fraud-like language, Congress intended there to be
21 discovery and no repose.

22 And that really ties into the last point,
23 which is that there are by our count if you look at
24 fraud, misleading, false statement-type statutes, there
25 are somewhere like 80 or 100-type statutes that use that

1 kind of language that would be applicable if this Court
2 affirms the Second Circuit.

3 This case was in -- the government says this
4 case was an outlier. There is no reason to believe this
5 case will remain an outlier.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Counsel.

9 The case is submitted.

10 (Whereupon, at 11:14 a.m., the case in the
11 above-entitled matter was submitted.)

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